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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin,  
  
Petitioner,  
  
vs.  
  
HONORABLE GEORGE B. HARRIS,  
Judge of the United States  
District Court for the  
Northern District of California,  
  
Respondent.

No. 21365

SUPPLEMENTAL BRIEF FOR PETITIONER

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I

THE FEDERAL RULES OF CIVIL PROCEDURE  
DO NOT APPLY TO HABEAS CORPUS.

That the Federal Rules of Civil Procedure are not appropriate in habeas corpus proceedings, except on appeal, does not require a devious route through thickets of analogies since the Federal Rules themselves clearly define the limits of their applicability. Rule 1, entitled "Scope of Rules," states that "these rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81." (Emphasis





added.) Rule 81(a)(2) specifies habeas corpus proceedings as one of the exceptions excluded from the scope of the rules by Rule 1:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus. . . ."

(Emphasis added.)

The clarity of this exclusionary provision has been obscured by the passage of time. As a consequence, a number of cases have erroneously applied certain of the Federal Rules to habeas corpus proceedings: Knowles v. Gladden, 254 F. Supp. 643 (Ore. 1965) (Rule 26); Schiebelhut v. United States, 318 F.2d 785 (6th Cir. 1963) (Rule 33); United States v. Wiman, 304 F.2d 53 (5th Cir. 1962) (Rule 36); Smith v. United States, 174 F.Supp. 828 (S.D. Cal. 1959) (Rule 35). It is important to note that all of these cases were decided 20 years or more after the Federal Rules had been adopted, and long after those who wrote them and applied them were still in the vanguard of active practitioners.



The genealogy of the Rule 81 exceptions discloses that the habeas corpus exclusion was neither casually inserted nor intended as part of a catchall section. The exceptions incorporated in the preliminary draft of the Federal Rules did not include a reference to habeas corpus. However, as Edward H. Hammond, a member of the legal staff of the Supreme Court's Advisory Committee on Federal Rules, noted, the final draft specifically excluded habeas corpus, evidently as the result of suggestions from the bench or bar. Hammond, Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure, 23 A.B.A.J. 629, 634 (1937).

It is clear that the framers of the Federal Rules, in making specific reference to habeas corpus in Rule 81, intended that the Federal Rules should not apply to habeas corpus proceedings. Habeas corpus, though considered a "civil action," was nevertheless a "special proceeding" to which the normal rules for civil actions did not apply, except when a habeas corpus question was appealed. On March 4, 1938, Edgar B. Talman, the Secretary of the Advisory Committee on Rules for Civil Procedure, appeared before the Committee of the Judiciary for the House of Representatives. In explaining the proposed Federal Rules, which required congressional approval, Mr. Talman testified:

"Rule 81 is entitled 'Applicability in General.'



The rules are intended to apply to all civil actions, but there are some special proceedings for which a special procedure has already been prescribed by Congress and to which they do not apply. . . . They apply [only] to appeals with regard to . . . habeas corpus. . . ." Hearings before the House Committee on the Judiciary, 75th Cong. 3d Sess., ser. 17, at 130 (1938).

That Rule 81 excludes habeas corpus proceedings from the scope of the Federal Rules is also evidenced in statements made by William D. Mitchell, Chairman of the Advisory Committee on Rules for Civil Procedure, during his discussion of the rules at various symposiums conducted by the Institute on the Federal Rules of Civil Procedure held in 1938 under the auspices of the American Bar Association. Chairman Mitchell stated that "the rules . . . do not apply in . . . habeas corpus. . . . That is all dealt with in Rule 81." American Bar Association, Proceedings of the Institute on the Federal Rules of Civil Procedure at Washington, D.C., and of the Symposium at New York City, at 187 (1938). "Nor do the rules apply to . . . habeas corpus, . . . except as to appeals." Id., at 230. That Rule 1, by its reference to Rule 81, does not extend the coverage of the Federal Rules to habeas corpus proceedings, is made clear by this discussion by Chairman Mitchell:





"The only other matter I need speak of in Rule 1 is the reference to Rule 81. Rule 1 provides, 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.' I will just skim over Rule 81 for a moment, to give you the idea. . . . They [these rules] do apply to appeals, but not otherwise, in cases . . . [of] habeas corpus. . . ." Id., at 233. (Emphasis added.)

The reasoning behind the exclusion of habeas corpus proceedings is not readily apparent, though the text of Rule 81 does suggest it. Rule 81 states that the Federal Rules do not apply to habeas corpus proceedings "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." Texts and cases prior to the adoption of the Federal Rules are not particularly enlightening as to the procedure followed in habeas corpus actions. However, the reasoning of the Advisory Committee is revealed in the testimony of Mr. Talman, the Secretary of the Committee, when he appeared before the House Committee on





the Judiciary during its hearings on the proposed rules. In explaining why, under Rule 81, the Federal Rules did not apply to habeas corpus proceedings, Mr. Talman said, "[T]here are some special proceedings for which a special procedure has already been prescribed by Congress and to which they do not apply." Hearings before the House Committee on the Judiciary, 75th Cong., 3d Sess., ser. 17, at 130 (1938). (Emphasis added.) Thus it is clear that the Federal Rules were not extended to habeas corpus because federal statutes already established what procedure was to be followed. This, then, explains the somewhat ambiguous note to Rule 81 which was appended by the Advisory Committee: "For example of statutes which are preserved by paragraph (2) see: . . . Title 28 . . . (Habeas corpus). . . ." Fed.R.Civ.P. 81, note to subdivision (a).

Discussions of the then new Federal Rules by contemporary practitioners disclose a uniform interpretation of Rule 81 as excluding habeas corpus from their coverage.

"In federal practice there are a number of cases of special nature which are not ordinary civil actions. Rule 81 makes specific mention of a good many special actions which are governed in whole or in part by special statutory provisions and to which these rules



do not apply except to the extent stated in Rule 81. In connection with the application of the rules, it is, therefore, essential to look at Rule 81 so as to see where they do not apply." Edmunds, New Federal Rules of Civil Procedure, 4 John Marshall L.Q. 291, 293 (1938-39).

"The exceptions mentioned in this rule [Rule 1] refer to certain proceedings named in Rule 81, such as bankruptcy, admiralty, citizenship, deportation and others [including habeas corpus], to which the new rules do not apply." Hopkinson, New Federal Rules of Civil Procedure compared with the Former Federal Equity Rules and the Wisconsin Code, 23 Marq.L.Rev. 159, 161 (1938).

Mr. Hopkinson further noted that "in the following proceedings, these rules apply only to appeals: . . . habeas corpus. . . ." Id. at 188 (interpreting Rule 81).

That federal statutes existed and governed practice and procedure in habeas corpus cases is also indicated by examination of Title 28 of the United States Code. Section 2246 describes the permissible procedure:

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition,



or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

In Knowles v. Gladden, 254 F.Supp. 643 (Ore. 1965), Judge Kilkenney, who held that section 2246 was not the exclusive procedure allowed, observed that that section was not enacted until after Rule 81(a)(2) had been in effect for 10 years. Id., n.3 at 254 and accompanying text. Judge Kilkenney concluded that section 2246 was not exclusive since it was enacted with knowledge of the Federal Rules and thus had to incorporate their import. He did not, however, take notice of the fact that section 2246 was merely declaratory of existing law and practice rather than being a new restriction. "It [section 2246] clarifies existing practice without substantial change." 28 U.S.C. § 2246, reviser's note (1964). (Emphasis added.) Nor was he aware that Congress had approved the Federal Rules on the assumption that they would not apply to habeas corpus proceedings because of the "special nature" of such actions in which procedure was "already . . . prescribe by Congress." Hearings before the House Committee on the Judiciary, 75th Cong., 3d Sess., ser. 17, at 130 (1938).

The Gladden case, and the decisions in Schiebelhut, Wiman, and Smith, are clearly erroneous. In none of these





cases were the courts apprised of the fact that the Federal Rules were never, in any part whatsoever, extended to habeas corpus proceedings.

It is also important to note that the federal courts cannot, by interpretation or any other means, extend the Federal Rules to habeas corpus proceedings. In authorizing the Federal Rules, it was the understanding of Congress that the Rules were a delegation of congressional power to limit the jurisdiction of federal courts. This is made clear by the report of Representative Sumners in presenting the Federal Rules to the House:

"It should be emphasized that any and all of the rules of procedure are subject to modification or repeal by Congress. Furthermore, it is the opinion of the Committee that amendments made by the Supreme Court to the united rules must be submitted to Congress in accordance with the method prescribed for submitting the original rules, i.e., they must be submitted to Congress by the Attorney General at the beginning of a regular session and will not go into effect until after the close of that session." H.R. Rep. No. 2743, 75th Cong., 3d Sess. 3-4 (1938).

The scope of the Federal Rules is therefore tantamount to





a jurisdictional grant by Congress. In view of the specific exclusion of habeas corpus proceedings under Rule 81, and because it was the intent of Congress that such actions should be governed by existent statutory procedure, it is submitted that no federal court can increase its jurisdiction by applying the Federal Rules of Civil Procedure to habeas corpus cases except, of course, that the rules may be applied, under Rule 81, to habeas corpus appeals.

## II

### FEDERAL PRACTICE DOES NOT PERMIT DISCOVERY IN HABEAS CORPUS PROCEEDINGS.

The exact federal practice in regard to procedure in habeas corpus cases is not clear. Examination of all authorities on the subject has failed to disclose any case wherein discovery has been allowed in habeas corpus (with the exception of the recent, and erroneous, Gladden and Schiebelhut cases, both of which relied on the Federal Rules). The silence of all authorities would suggest that it is not the practice, and has never been the practice, to allow discovery in habeas corpus proceedings. The existing practice has apparently extended no further than to depositions, oral evidence, and affidavits, used as part of an evidentiary hearing. 28 U.S.C. § 2246 and reviser's note (1964).

Discovery interrogatories are the result of Equity



Rule 58. Fed.R.Civ.P. 33, notes of Advisory Committee.  
This was the only federal provision permitting discovery  
prior to adoption of the Federal Rules. 2A Barron and  
Holtzoff, Federal Practice and Procedure § 641 at 11  
(1961). Habeas corpus is a civil proceeding. Fisher  
v. Baker, 203 U.S. 174, 181 (1906). Thus the equity rule  
concerning discovery has never applied to proceedings in  
habeas corpus.

#### CONCLUSION

For the foregoing reasons, and for the reasons  
advanced in petitioner's opening brief, it is respectfully  
submitted that a writ of mandamus and/or prohibition should  
be granted.

DATED: February 10, 1967

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